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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Peter H. Kang, Magistrate Judge

IN RE: SOCIAL MEDIA ADOLESCENT ADDICTION/PERSONAL INJURY PRODUCTS LIABILITY LITIGATION,

NO. C 22-md-03047-YGR (PHK)

San Francisco, California
Thursday, July 11, 2024

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Thursday - July 11, 2024 **1:08 p.m.**

P R O C E E D I N G S

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THE CLERK: Please remain seated and come to order. Court is now in session. The Honorable Peter H. Kang presiding.

Now calling 22-3047, In Re: Social Media Adolescent Addiction and Personal Injury Products Liability Litigation.

Counsel, when speaking, please make sure you state your appearance for the record and the court reporter, and approach the podiums.

Thank you.

THE COURT: All right. Good afternoon.

ALL: Good afternoon.

THE COURT: All right. So we're here for this month's DMC. Unless there's something in the sections on just reporting on status, should we go straight to the ripe discovery issues or is there something prior to that section anybody wants to talk about?

MS. SIMONSEN: Good afternoon. Ashley Simonsen, Covington & Burling, counsel for the Meta defendants.

MR. WARREN: Good afternoon. Previn Warren, counsel for the personal injury and school district plaintiffs.

THE CLERK: Good afternoon to both of you.

MR. WARREN: Good afternoon.

MS. SIMONSEN: We have a positive development to report on an issue, which is that we've resolved our dispute regarding the timing of the remaining custodial file productions for the Meta anticipated deponents.

I wanted to ask if Your Honor would so order the agreement simply in light of the other orders that govern custodial file productions to ensure that we do have a court ordered stipulation.

THE COURT: Is that --

MR. WARREN: We have no objection to that. And the parties can work together to submit something for Your Honor.

THE COURT: So ordered, and if you need something in writing, you should submit a stipulation and proposed order.

MR. WARREN: Very well.

MS. SIMONSEN: Thank you, Your Honor.

MR. WARREN: Thank you.

THE COURT: Thank you. And thank you for working that out.

MS. SIMONSEN: Our pleasure.

THE COURT: All right. So who wants to talk about -- on ripe discovery disputes, the first one is forensic inspection protocol.

MS. PIERSON: Good afternoon, Your Honor. Andrea Pierson for the TikTok defendants.

THE COURT: Good afternoon.

MS. CARROLL: Good afternoon, Your Honor. Jessica Carroll from Motley Rice for the personal injury plaintiffs.

THE COURT: Okay. Gotcha. Good afternoon.

Okay. So it appears to be the -- I guess it's really defendants pushing the issue, so why don't you go first.

MS. PIERSON: It is. Thank you, your Honor.

Your Honor, defendants seek the Court's assistance today in exercising their right pursuant to Rule 34 to inspect forensic images of the devices that the bellwether plaintiffs say they routinely use to access the defendants' platforms.

Our specific request to you is that you order the parties to negotiate a protocol for full forensic imaging and defendants' inspection of that imaging.

Plaintiffs' claims put the devices squarely at issue. There is a compelling need for inspection of the devices and no alternative means to understand key issues in this case presented by the devices.

Defendants and their experts need to inspect forensic imaging of the devices to adequately evaluate the validity of the plaintiffs' claims. First, that they were addicted only to defendants' platforms and not to the devices themselves, the devices' features, or to other apps or platforms added to the devices.

And second, that the defendants' platforms were the sole cause of their addiction, and that their alleged injuries had

no alternative causes from the devices themselves, their features, or their applications.

Defendants understand that the plaintiffs have concerns related to privacy of the information on their devices that must be balanced. That's why defendants drafted a protocol that includes creation of the images and oversight by neutral third -- by a neutral third party, and inspection and production subject to protections of the Court's protective order and privilege log protocol.

We're open to discussing the parameters of the protocol with the plaintiffs, but they declined. And that's because there's a threshold dispute of whether defendants' experts and counsel may inspect the forensic images with those protections in place.

The parties also disagree about which devices should be subject to the protocol.

By way of background, Your Honor, Section 13 of the plaintiffs' fact sheet asks plaintiffs to identify the devices used to access the platforms on a routine basis. Each of the 12 bellwether plaintiffs identified multiple devices routinely used: Tablets, phones, and computers. In fact, from the list of -- from the list of devices that have been provided by plaintiffs to date, we know that there are at least 18, if not more, different makes, models -- makes and models of devices that the bellwether plaintiffs possess.

So in March we wrote to the plaintiffs and asked them to forensically image all their devices. And in April and May, we served a request for inspection and production of any devices identified in the PFS's and any imaging within the plaintiffs' custody and control.

We also sent a proposed protocol which we attached to the letter briefs filed yesterday, Your Honor, that was modeled after the protocol entered by Judge Gonzalez Rogers in the *eHealth Insurance* case.

Defendants' proposed protocol essentially said four things: First, that a neutral third party would make and store forensic imaging of the routine devices.

Second, that the imaging would be subject to the Court's protective order and its protections.

Third, that the plaintiffs would be able to review the image and log information that they deemed to be privileged, CSAM, or clearly non-responsive. And we've offered to work with the plaintiffs to define what would be "clearly non-responsive," but a couple of examples that we provided are things like contacts or credit card and payment information.

Defendants' counsel and their experts would have access to the portions of the forensic image that are not subject to the log so that they can inspect, review, and test imaging in a holistic way and within the confines of the work product protection.

As I said, the plaintiffs rejected the proposed protocol. They did agree, however, that forensic imaging for preservation of some devices is appropriate, and they informed us that they were in the process of obtaining that for some of the devices, although we don't yet have the details related to that.

The parties have had multiple meet and confers, in fact, two more since we submitted the DMC statement, and we've agreed that, first, full forensic imaging should be conducted; and second, to the extent that plaintiffs' vendor has already created full forensic images and will provide to us the chain of custody and details necessary to assure its accuracy, we don't need to repeat that work.

However, as I said, we are still in disagreement about whether defendants' experts should be permitted to inspect full forensic images of the devices and which devices should be imaged and subject to that inspection.

It's defendants' position that it should be all the devices on which the plaintiffs routinely used their platforms, obviously, subject to the requirement that they have to be within the plaintiffs' possession, custody, or control.

It's plaintiffs' position that they ought only to have to provide information from forensic imaging of the plaintiffs' primary device; and they've suggested how that might be defined, but it is one device for any period of time.

We believe, based on the information we have thus far from

the complaints and from the information provided by plaintiffs, that the plaintiffs are using multiple devices at any given point in time to access our platforms.

To orient the Court, I know that you wrote the decision in *Jones*; we're obviously familiar with that, Your Honor, so I won't belabor what a forensic image might contain.

THE COURT: I've read the briefs, so you don't need to repeat what's in the briefing.

MS. PIERSON: Thank you.

But I will say it's important to note, Your Honor, that the forensic images of these devices are all unique. In fact, there is no one forensic image or one list or table of contents that apply to the forensic images for all of the devices that we're talking about.

The content of the forensic image and the device is unique and depends on the type of device. Is it a phone, a tablet, or a computer?

It depends on the model. Is it an Apple an Android, or other model?

It depends on the features that are on the device at any given period of time. And we know that the features for different makes and models change over time.

We know that there are device settings that can be applied and changed over time by the user. There are apps -- in fact, there are thousands and thousands of apps that a user can load,

can use, and can delete. There are messaging services and different Internet browsers.

And in the case of Apple devices, the version of iOS that's downloaded at any given time will impact not just what the digital footprint looks like in the forensic image, but it also will impact what databases are contained within the forensic image.

The storage capacity, the use of Cloud storage, and so much more that's within the control of the individual user and depends on the individual device, all of those things impact the content of the forensic image.

And maybe more importantly, Your Honor, is that while all of these devices will have databases and log files and applications -- some of them, thousands -- the device forensic images within the image, each of those things are interconnected, so that looking at one database or one file within the forensic image inevitably leads to numerous others.

These are essentially threads that make up a much larger tapestry. And it's not possible, Your Honor, to look at the individual threads and get a complete picture of the tapestry that is, in fact, the use of the device.

Let me give you a concrete example, Your Honor, of this. On Android devices, app developers can control which data from an app is included in the device backups, which might impact how much data is available in the forensic image.

App developers on iOS devices, in contrast, must include all app data and backups by default. Necessarily, then, the types of databases within those two types of devices will be different. But it's even more complicated than that, Your Honor.

Depending on the version of software that's downloaded on the device at any given time, the make, the model, and the settings of the device, all of those things will impact the content of the forensic image.

There is -- there is no table of contents that crosses all of these devices or all of the types of devices. And remember, in the case of the bellwether plaintiffs, Your Honor, we're talking about 18 or more different types of devices. There's not one list that fits these.

Under Rule 34, a party has a right directly to inspect copy, test, or sample electronically-stored information. And the advisory committee notes acknowledge direct access to devices for inspection may be justified based on the claims in the cases.

That notes consistent with the case law which we've cited in the letter brief. And the case law on this point makes clear that a court may order forensic imaging and inspection where there is a compelling interest in the device or image, and there is no alternative way to obtain the information.

That's the relevant standard.

In determining whether a compelling interest exists, courts consider whether the plaintiffs actively put their devices at issue when they chose to sue. And here we know that the plaintiffs actively put their devices at issue. They say in the master complaint that they are addicted to defendants' platforms and only to defendants' platforms, and that those platforms alone caused them to suffer various personal injuries.

The master complaint discusses how the plaintiffs' smartphones supposedly caused the same alleged harms plaintiffs attribute to defendants' platforms. They cite to articles that call those devices "slot machines in their pocket." And the article specifically points to features that encourage extreme usage that are device-specific features, not defendant-platform-specific features, device features.

The master complaint says that those features and other applications, not the defendants' platforms, include things such as texting, e-mailing, browsing the internet, gaming, accessing cyber pornography and video chatting, and it says that those things are potentially addictive, distracting, and harmful.

The master complaint points to other features that are device-specific or common to platforms unrelated to the defendants which plaintiffs also say are harmful, such as nighttime notifications, insufficient screen time limits,

filters, infinite use, and others.

The defendants' experts need access to inspect the full forensic images of the devices upon which plaintiffs' addictions allegedly played out to test whether evidence of addiction actually exists and to explore the cause and any potential alternative causes for plaintiffs' alleged addictions.

There is no alternative means to get information about how plaintiffs used their devices other than from the devices themselves. Defendants cannot simply get usage data from thousands of different app makers and device manufacturers for 20 or more different models and different types of devices.

There are a couple of cases that we've cited in our letter brief, Your Honor, that we think are -- are important and factually analogous that you should consider.

The first is the Apple case that was decided in 2019 --

THE COURT: I've read the cases. You don't -- you don't need to summarize the case law for me.

MS. PIERSON: Okay. I would just say this, Your Honor, not only does the Apple case set out the standard that we believe is applicable to analyzing this question, but also that it takes on directly the *Henson* case that's relied upon by the plaintiffs. And the Court there found that the key distinction was that in *Henson*, there were no protections afforded for the plaintiffs' privacy. There was no presence of

a third-party neutral in the process. There was no inclusion of the protections of the protective order.

Similarly, we find the *Abilify* case to be on point. It involves a personal injury. And there as well, the Court ordered forensic imaging with protections like those that are offered in the protocol that the defendants have proposed.

As it relates to the two cases that the plaintiffs rely on primarily, Your Honor, *Henson* and *Jones*, we find that those cases are not analogous. Unlike this case, neither *Henson* nor *Jones* implicated the broad performance and usage questions plaintiffs raise here when they point to the alleged failures and addictive properties of features and settings common to the devices themselves and myriad other platforms on the devices.

And neither of those cases involve an allegation of addiction on or to a device that includes compulsive use over a long period of time and specific patterns of behavior.

THE COURT: Again, in the interest of time, I think the *Jones* case is the opinion I wrote, so I'm familiar with that one intimately.

MS. PIERSON: It is.

THE COURT: And the other -- I've read the case law, so you don't -- I understand your argument. You also briefed the issue, so...

MS. PIERSON: Understood. I thought it might be helpful, Your Honor, to talk really specifically about some

things that we think are critical to the forensic -- to reviewing full forensic imaging of the devices and maybe more specifically why we think the plaintiffs' proposal to use search terms for portions of the information in the image and production of isolated databases and others, why we think that just doesn't work.

First and foremost, as I mentioned earlier, Your Honor, all of the information in the image is interrelated. There are hundreds, if not thousands, of databases and logs, and those logs work together and populate one another. It's not possible for defendants' experts to take each of the individual threads in isolation and try to weave those into what was the original tapestry.

THE COURT: Stop you there.

Are you saying there are hundreds and thousands of databases and logs on each individual device?

MS. PIERSON: No. To be clear, Your Honor, there can be hundreds of databases within an individual device, depending on the device -- the device type. The log files will be separate and apart from that.

THE COURT: Okay.

MS. PIERSON: Okay.

I want to give you a couple of concrete examples of where the need to look at this holistically becomes really important, Your Honor.

In the case of notifications, that's a prime example, we know that the master complaint points to defendants' platforms and allege that notifications from defendants' platforms alone, especially at night, cause their addictions and injuries.

Full forensic imaging, inspection of that, will show us what notifications the plaintiffs received and when and from whom, whether it's the device, the defendants' apps, or other apps. It will show us how plaintiffs interacted with the notifications. It will tell us whether the notifications were received alone or in combination. Were they sent individually? Were they stacked? Were they timed?

It will tell us whether the notifications were used simultaneously with plaintiffs' use of other platforms and device features. Notifications are not all kept in a single database. They can be kept in the database that pertains to usage of a particular app; they can cross databases within the app; and they are essentially filed within the forensic image differently depending on the device, the operating systems, and the applications.

In a given case, if a plaintiff alleges "I received a series of notifications from one of the defendants and that's what woke me up at night," it will be critical that our experts are able to look across the databases and to compare those at the same time to know: Did the plaintiff receive the notifications? Did they act on the notifications? Was the

notification sent alone or was it sent in combination with other notifications?

THE COURT: Stop you there.

So if it's a notification from one of the defendants to a bellwether plaintiff's phone, does the defendants' system keep a record of having sent the notification?

MS. PIERSON: Yes. But what the defendants' system won't have is a couple of things, Your Honor.

What are all of the other notifications that the plaintiffs was receiving at the same time, not just from the defendants' platforms, but from other platforms that are not defendants? And also, what notifications are they receiving from the device itself?

There are settings on the device too that will impact this as well. We all have settings or our devices that can silence notifications or time the notifications or stack the notifications. If we were to look only at the information that's within any individual defendant platform, that would not give us the complete picture as to what information the plaintiff is receiving by notification and, more importantly, what are they doing in response to that information.

That requires us to look across multiple databases simultaneously. And because there is no table of contents, it's not as though we can say, "Give us the databases for these 10 apps and that's the end of the question."

The question is impacted by the features on the device, the settings, what settings were activated and, you know, numerous other factors that I won't repeat here.

But that's just one example, Your Honor.

Another example, it will be critical, given the allegations in the master complaint, that the defendants are able to look at things like switching behaviors and the focus of the user at the time that they're using their device.

In isolation, a database that pertains to a particular platform, defendants' or another platform, won't tell us what behaviors the plaintiff was engaged in in switching between apps and features and -- and devices.

So again, to go back to the bellwether plaintiffs for a second. If a bellwether plaintiff alleges that they were awakened in the middle of the night by a notification from my client or one of the other of the defendants, and that as a result of that, they were scrolling through my client's platform, it will be important for us to know: Were they exclusively focused on my client's platform? Were they going back and forth between numerous other platforms? And we know there can be many on any individual device. Were they moving between devices? And were they focused on any particular platform or the content of that platform?

We can't tell that by looking at individual databases or log files. We have to look holistically at full forensic

images in order to be able to understand the complete picture.

And that's compound by the fact, Your Honor, that the claim here is addiction, and addiction over a -- a duration of time. There's no plaintiff in this case who claims that they were addicted for a day or a week or a month.

So now we're talking about: What's the pattern of behavior in the use of the device across a long duration of time?

That requires an opportunity to inspect the full forensic image to be able to see holistically, is there evidence of compulsive use? Is it compulsive use of a defendants' platform alone or a variety of things? Is the cause of that the interruption that the plaintiffs claim from a defendants' platform or is it something about the device that causes that?

Now, we know that the master complaint includes allegations that there are features on the devices -- that are common features on the device itself that cause the user to repeatedly engage. So a key question in this case will be: What is it that's causing the repeated behavior of the plaintiff if, in fact, evidence of that exists? Is it something on defendants' platforms, on other platforms, or is it a result of a device or feature itself?

You know, similarly, we know that the plaintiffs have put at issue features that are common to the devices, like parental controls, screen time notifications, the ability to shut down

devices based on screen time.

That crosses not just the defendants' platforms but all of the other platforms on the device, and the features and settings of the device itself. All of those things are working in tandem any time a user is engaged with their device.

There are other things about the forensic image that we're interested in looking at, Your Honor. Things like system logs and the app-specific history files for defendant and non-defendant platforms. Things like browsing history and device-specific features and controls, and deleted information.

But at the end of the day, with hundreds of potential device features and thousands of potential applications that can be on any one of the 18 or more device types that we know the bellwether plaintiffs have, it's not reasonable to think that we could come up with a list of databases to be produced or a list of search terms that would allow us to search across text-searchable fields for all of those devices.

We require the entire forensic image for our experts to inspect to really understand completely the very device usage that these plaintiffs have put at issue in their master complaint.

And there is no alternative means to get this, Your Honor. We cannot go to the manufacturers of every app that was ever available to all of these plaintiffs over the relevant time period and ask them for all of the information that they have

and weave together this tapestry.

I mean, even if we could, that would not include the features of the devices on each of the different devices that the plaintiffs use to access our platforms, which vary within the device as well.

Only inspection of full imaging with appropriate safeguards can help us to understand, evaluate, and test the plaintiffs' claims.

They claim that their addictions started on the devices; that it was perpetuated by use of the devices; that their injuries occurred on or while using the devices; and in many cases, they say that evidence of the injury itself is on the devices.

Plaintiffs claim that neither the devices themselves, nor anything other than the defendants' platforms, caused their addiction or injuries. We have the right to explore and test those claims. And we can do that within appropriate safeguards, just as the Court ordered in the *Apple* case and in the *Abilify* case, and as Judge Gonzalez Rogers ordered in the *eHealth Insurance* case as well.

The devices that the plaintiffs routinely used are at the very heart of their claims. Plaintiffs elected to put those at issue in the master complaint, and they cannot now shield them from inspection.

Thank you, Your Honor.

THE COURT: Okay.

Plaintiffs.

MS. CARROLL: Thank you, Your Honor. Again, Jessica Carroll for the personal injury plaintiffs.

Just to start by addressing a few of Ms. Pierson's points related to the scope of the devices, the routine devices in the PFS are not an accurate representation of the devices that plaintiffs used to access social media primarily.

To give one concrete example of this -- because I think there was an overstatement as to all bellwether plaintiffs having multiple devices -- I know of one of Motley Rice's bellwether plaintiffs specifically who, I think, only selected one, a personal cell phone.

But under our definition of primary device, she would have two primary devices because she has an old cell phone that she didn't trade in in her possession, custody, and control that she used during the relevant time period as her main device, and then she has her current cell phone. And so in that case, there's two.

There are often situations where a child has an iPad first, and they access social media on that as their primary device, and then a few years later they get a cell phone, and then that becomes their primary device. Most individuals who are accessing these social media apps are doing so on one device at a time.

But that doesn't mean that it is only one device. And I've made that -- tried to make that abundantly clear to defendants over the course of our meet and confers, and it's still being misrepresented here today.

So I just wanted to explain that first before we get to what I don't consider to be a dispute over forensic imaging because plaintiffs have agreed to do a full file system forensic image of these primary devices where -- which are going to contain the most relevant information.

We agree that these devices will have certain types of data and information that the defendants are entitled to have. But they're not entitled to a full forensic image. You know, they -- their request is reaching far beyond the tailored and proportional discovery requests, and are asking for an entire mirror image of a device that is essentially a digital record of nearly every aspect of an individual's life that I have not found one case where that has been allowed to happen.

And so this would be -- this is -- it's a novel request, and I feel like plaintiffs have been more than cooperative in our meet and confers. We've been more than willing to give them exactly what they want. They have offered no basis for their assertion that this is the only way that they can obtain this information.

I've got a list from our expert, and this is an expert who is a forensics expert, who is routinely hired by Ms. Pierson's

firm, who said it is absolutely possible to produce this data in a targeted way while not producing irrelevant data and private data that the defendants are not entitled to.

You know, listing some of the data categories that we would be able to produce from in a relevant proportional way is the app usage data, browser history, search data, location data, communication logs, media files, metadata, application settings and preferences, deleted data and artifacts, device usage metrics, health and fitness data --

THE COURT: The court reporter is going to ask you to slow down.

MS. CARROLL: Oh, sorry.

Health and fitness data and third-party app data.

Related to the apps, not every app on a device is going to be relevant. There are many that are going to be. Defendant app -- like Ms. Pierson said, defendant app features, notifications, those databases, some of those are going to be produced wholesale because they should. And those conversations we've introduced as being willing to meet with their ESI vendor and talk through what format would get them what they want.

I think the -- to get to the heart of the issue here and to cut through all of the hyperbole, there's only two situations where courts have ordered a full forensic image of any kind, and that's where there's evidence of some sort of

malfeasance or misfeasance in the discovery process, which is not what is the case here. We haven't even been allowed to produce this data. That's the *Abilify* litigation case that they cite. And the other one is where the device performance itself is at issue, and that's the *Apple* case that they cite.

And I don't know if Your Honor has had the ability to -- or opportunity to read the protocol that was in that --

THE COURT: The Court has.

MS. CARROLL: Okay.

But I would just point to the fact that even where the courts have allowed a full forensic image, what is accessible by the party requesting that is very limited under the appropriate boundaries within the discovery rules and the case law as it's -- as it normally is.

And -- let me see what else.

The other -- the other thing related to this -- this support -- I think I mentioned this already, but we've agreed and, as of last evening, defendants have also agreed to confer with the ESI vendors, but have relayed that that is not something that would set aside this dispute, which, again, I don't think is a dispute at all.

And we've been trying to do as your standing order requires and meet and confer in good faith and provide the relevant information that we ought to. But I don't think there's any case law out there that supports a full file

forensic image to the defendants.

If there is any deficiency that they can identify, they have the ability to bring that to Your Honor, and we can work with our ESI vendor and our forensic experts to provide the information that's missing.

THE COURT: Okay.

MS. PIERSON: May I respond briefly, Your Honor?

THE COURT: Briefly.

MS. PIERSON: I will be brief.

Just a couple of things. First of all, the *Abilify* case sets out the two circumstances in which full forensic imaging and inspection can be appropriate. And the very first one is the one that we're talking about, which is it's -- where the use of the computer or computer files is the focus of the claims in the case. They have put at issue the use of the devices at the heart of this case.

We're not claiming that there's been some malfeasance at all. This isn't a remedy under Rule 37. This is a request to inspect under Rule 34.

And the example that Ms. Carroll gave of two devices potentially, but only one of those being at issue. Of course, old devices in the plaintiffs' possession are relevant and contain relevant information. And the same is true with the device that the plaintiff is currently using.

THE COURT: I don't think she's disputing that.

MS. PIERSON: Okay. Thank you. That was --

THE COURT: You're shaking your head here.

MS. CARROLL: Yeah. No, I am. I'm not disputing that.

THE COURT: Okay. Just for the record.

MS. PIERSON: We have consulted with multiple experts in the field, Your Honor. The information that I provide today isn't mine alone. It's based on their analysis and the information that they've provided. They tell us that they need to inspect a full forensic image because the use of the device holistically is at the heart of this case.

And the things that Ms. Carroll suggests that we can look at in individual databases doesn't satisfy the compelling need that the defendants have to look at those things holistically and as they are interwoven together.

Ms. Carroll gives the example of "not all apps are relevant." And I actually beg to differ. The example that we've talked about previously that she suggested is a SkyMiles app, for example.

It's true, on its face, you might say that a SkyMiles app is not relevant, but if their claim in this case is compulsive use of our platforms on the device, and it turns out they compulsively use a different app -- whether that's SkyMiles or Roblox or any other app -- that's at the heart of this case, and it goes to the question of causation and alternative

causation.

We did tell -- the plaintiffs did suggest to us yesterday that our ESI vendors could talk directly, and we're open to considering that, Your Honor, to form the parameters of the protocol.

And that is our request today, Your Honor, that you give us direction to meet and confer and negotiate the parameters of a protocol that would provide for full forensic inspection of all of the routine devices identified in the PFS 13A, and that, in addition to that, we work out the parameters of a protocol that would allow for the inclusion of a third-party neutral and inspection by our experts of full forensic images, subject to the log protections and protective order as well.

THE COURT: Ms. Carroll, anything further?

MS. CARROLL: Yeah. I'll respond briefly because I think it's fair to point out that their request is akin to us asking any one of their custodians to hand over a device and let us run through it, or any of their databases, let us rifle through those. It's not something that's within the discovery rules that we can do.

And to go back to the case that Ms. Pierson is discussing, the *In Re: Abilify* litigation that they cite, the plaintiffs here are not putting the device at issue. I understand that defendants have a right to pursue alternative causes, and we are more than willing to provide them the data and information

from these devices to be able to do that.

And until this Court has any evidence of any kind or support that there is no alternative way that this can be done, where plaintiffs are saying the alternative way is we'll provide it to you, under the ESI protocol that exists, there's no need to go through further expense and delay when we have industry-leading ESI and forensic vendors that we're working with already. We've been doing this for two years. Let us produce this data to you, and if there's an issue, bring it to Your Honor.

THE COURT: So it would, of course, be quicker and probably less expensive for the plaintiffs if you just gave them the images, but I'm not going to hear an argument from you in the future that it's burdensome and costly and, you know, that there's been delay because of the burden and cost here.

Am I getting that commitment from you?

MS. CARROLL: That's actually a point I had written down, Your Honor, is that it would be a lot less burdensome for us to produce this --

THE COURT: That's right.

MS. CARROLL: -- in a comprehensive way. But we have an ethical obligation to our clients and --

THE COURT: So you're willing to accept the burden?

MS. CARROLL: We're willing to accept the burden.

THE COURT: Okay. All right.

Okay. Thank you. And thank you for the briefing.

So I start with -- it's interesting, usually in discovery disputes, you don't get a lot of guidance from the Supreme Court. I start with *Riley v. California*, 573 U.S. 373, where the Supreme Court said (as read):

> "Modern cell phones as a category implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. Cell phones differ in both the quantitative and a qualitative sense from other objects that might be kept on an arrestee's person."

This is a criminal case, of course. (as read):

> "The storage capacity of cell phones has several interrelated consequences for privacy," and they go through those, and go on to say, "It is no exaggeration to say that many of the more than 90 percent of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives from the mundane to the intimate."

And I can go on.

And then, again, typically, don't get tons of guidance from appellate courts on discrete discovery issues like this, but the 9th Circuit did say in *Jones v. Riot Hospitality*, 95 F.4th 730 (as read):

"To be sure, there is a strong privacy interest in the contents of mobile phones. For discovery purposes, those privacy considerations are generally considered either in Rule 26(b) proportionality analyses or as part of Rule 26(c) protective orders."

I also thankfully have guidance from Judge Orrick of this Court who affirmed Magistrate Judge Ryu's order denying of forensic imaging of cell phones. This is from *Wisk Aero v. Archer Aviation*, 2022, Westlaw 6250989.

And he wrote that (as read):

"Courts have often expressed special concern about permitting inspections of personal computing devices. The advisory committee notes to FRCP34, which governs production of electronically-stored information explain that the rule, quote, is not meant to create a routine right of direct access to a party's electronic information system. Although such access might be justified in some circumstances, courts should guard against undue intrusiveness resulting from inspecting or testing such systems."

And later on he quotes the *Apple* Case at 219 Westlaw 3973752, which says personal devices are afforded special privacy protections, which is in line to the quote I read from *Riley v. California*.

All right. And then obviously there's -- both parties

have cited their cases where forensic inspection was ordered and cases where it was not. For example, in the *Henson v. Turn* case, it was not ordered. It was denied. In the *In Re: Anthem Data Breach Litigation*, 216 Westlaw 11505231. This -- Magistrate Judge Cousins denied access to the computer systems -- the full computer systems, which included a request for phones. He found that disproportional under the rules.

So given that the defendants here take the position that the standard is compelling interest, I find they have not met the compelling interest standard.

I note in the *Wisk Aero* case, I think it is, Judge Orrick noted that the standard for the relevance part of this is good cause. And I haven't seen good cause either given what the plaintiffs here have agreed to do.

So as I understand -- and I just want to make sure I got this right, Ms. Carroll -- for the devices at issue, in addition to working out search terms, your clients -- you are agreeing on behalf of your clients to provide app usage data, browser history data, location data, communication logs, media files, metadata, application settings, and that whole list of other types of data that you had read off which is buried in the record.

Is that correct?

MS. CARROLL: That is correct.

Let me make one clarifying point with that, if I may,

Your Honor, which is related to the search terms -- because I think that it wasn't clear in the briefing, at least on defendants' part.

We mentioned using search terms for certain things like large e-mail databases on a device. That is not how we intend to, you know, parse and search for relevance of every data category here. Like I mentioned earlier, there are some categories of data, certain app databases that would be likely produced in wholesale in its native format or whatever format, that our ESI vendor --

THE COURT: And you're agreeing to that because we all recognize search terms won't pick up --

MS. CARROLL: Absolutely.

THE COURT: Okay. All right.

So to the defendants' point, Ms. Pierson's point, that there are potentially thousands and many, many apps that could have been used, as part of the meet -- I'm going to order you to meet and confer to work out the details of this. I'm ordering plaintiffs -- because it's a limited number of devices we're talking about -- right? -- it's just for the bellwethers here. You know what apps are on those devices currently. So I want you to give a full list and a chart to the defendants of what all those apps are. Okay?

MS. CARROLL: We've agreed to do that, Your Honor.

THE COURT: Okay. And so nothing stops the defendants

from sending subpoenas to those limited number of app companies. It may be a large number, but it's not thousands. All right? I doubt it's thousands. And if you tell me it's thousands, I may change my mind here.

MS. PIERSON: I don't know, Your Honor. I mean, we're talking about 20 different devices. We don't have the benefit of having seen the forensic images. They've seen the forensic images.

But, you know, plaintiffs have represented to us that we can have app-specific history files for defendant and non-defendant platforms. We need all of those. The ones that are presently on the phone and ones that are deleted as well.

THE COURT: I'm saying they have to give you a list of every single app on every single device, all right, and then you can proceed from there. All right?

MS. PIERSON: We also need the app history usage on the phone itself, the forensic image itself.

THE COURT: Okay. So part of my order here on the meet and confer is, you both have experts, you both have some sense of what kinds of, call it log system database, non kind of search term searchable data is on the devices that would help the defendants figure out -- create what you call this tapestry. All right?

Work and have your experts as part of the meet and confers, if appropriate, work to identify, not by name but

descriptively, because often document requests are requests made descriptively as opposed to go-get-'em requests, but if you know, for example, from your experts that Apple has these names for these types of databases for the system settings, for example -- just for an example -- you can give those as examples of what you're looking for -- right? -- and what you expect them to produce.

And I'm going to expect the plaintiffs to be forthcoming in producing and identifying what the various settings are and what the databases are on the devices to avoid a full forensic turnover.

Do you understand what I'm saying, Ms. Carroll?

MS. CARROLL: I do. Thank you.

THE COURT: Okay. And so the goal here is I'm not going to be able to figure out exactly, because, you know, I don't have the phones and I don't have the system files, and I haven't used my engineering skills in a long time to figure that stuff out. So what I want you to do is work with the people who know the technology. All right?

As I've said previously in other contexts, communicate transparently in the meet and confer process to figure out what types of, as you call, the databases, system log files, the metadata files, the other kinds of things that would help create this tapestry.

And I'm going expect the plaintiffs to transparently

identify whether the devices have those and then, if so, produce them.

All right?

All right?

Is that understood?

MS. CARROLL: It is, Your Honor.

May I ask one clarifying question related to the scope of the devices?

THE COURT: I'm not there yet.

MS. CARROLL: Okay.

THE COURT: Okay. And so the other part of it is because there will be some, call it data, on the phones that can be found through search terms, work out -- I'm going to expect you to meet and confer and work out a set of search terms. All right?

I understand this may be an iterative process, and nothing's stopping the defendants from saying, "Oh, now that we've looked at these files, it's calling -- it's calling to data in another file and we want that." All right?

And I'm going to expect plaintiffs to produce that and not require a brand-new set of document requests, right, that this is going to be an iterative, cooperative, and collaborative process to get this because I'm doing the plaintiffs a favor here by not requiring a full forensic image handover.

Do you understand that?

MS. CARROLL: Yes, your Honor.

THE COURT: Okay.

MS. PIERSON: Your Honor, there are two sort of practical problems that we have here. I mean, just like you don't know what you don't know about the bellwether plaintiffs' devices. Neither do we. And --

THE COURT: But you will. My point is you will.

MS. PIERSON: I understand.

A simple list of the apps is not going to tell us that. We will need from the plaintiffs a complete listing of the things that are on their phone. And if they group them in categories the way you described, maybe that's a good place to start. But without knowing the --

THE COURT: Other than a list of all the apps, what else do you need that's on the phone?

MS. PIERSON: Apps, features that are -- the unique features to the device as well, the features that are used or not used on the device at any given time. It's more than just apps that are -- that are loaded on your phone.

THE COURT: Okay. So when I was talking about data, right, I meant things that you were talking about, like settings, feature settings -- right? I mean, once you know -- do you know -- you know what the models are.

MS. PIERSON: Some, not all. We don't have a complete listing of all of the routine devices.

THE COURT: I want the plaintiffs to provide every model number of every bellwether device we're talking about to the defendants so we have a complete universe of what the devices are. All right?

And if you know what kind of features you are looking for, you've listed a bunch, like parental control features, that are, like, specific to the phone itself as opposed to some app, list those out and tell them that we want the log -- however they're logged, whether they're logged or there's a database of those features, work with the experts to describe what it is you're looking for for each of the features.

Do you understand?

MS. PIERSON: We can try to do that.

I would just note the efficiency of -- if plaintiffs possess the forensic images from the devices already, this is information that is easily accessible to them, as opposed to us researching 20 different models of devices and coming up with that list.

THE COURT: You're going to do have to do that anyway once you get the -- if I gave you the full forensic images, you're going to have to do that anyway with your experts anyway. So this -- all I'm doing is having you do it without getting the full image. Because I'm concerned about -- have concerns about the overbreadth and the privacy issues of a full image.

If it turns out -- if it turns out that I hear that the plaintiffs are not being forthcoming and, you know, responding and giving information, you know, this is without prejudice you coming back saying that the process isn't working out.

So it behooves everyone here to work cooperatively on this.

MS. PIERSON: Getting that kind of a listing by a particular deadline, Your Honor, I think could be helpful to start the process.

We are concerned about the fact that, without some idea of what the plaintiffs' device is, what they look like, it becomes difficult to depose the plaintiffs, and that delays us on our schedule.

So, you know, if this is going to be an iterative process, it will be time-consuming. And really the sooner we can get it, the better.

THE COURT: You'll get them a list within a week?

MS. CARROLL: I cannot answer that question right now, Your Honor, because there's -- there are 12 bellwether plaintiffs. And I've got to reach out to their counsel to figure out -- I know some have been forensically imaged -- the full file system imaged, some have not. Some are in the -- they're in the process of doing that. But I would need to get with counsel for those bellwether plaintiffs to get a date. But we could provide a date to the defendants and the Court

probably by Monday.

THE COURT: Okay. Tell you what: For those devices where you have the information or can readily get the information, don't wait, start producing it on a rolling basis and disclosing it now if you have it. Okay?

MS. CARROLL: Yes, Your Honor.

THE COURT: And work expeditiously to get -- again, it's just a list of apps and a list of -- it behooves -- the defense, give them a description of the features for -- that you're looking for that are besides the apps. Okay?

MS. PIERSON: We could use specific identification of the makes and models of each of the devices in their possession, too, Your Honor.

THE COURT: So if it's 12 bellwethers -- and let's even assume they've got even -- let's assume, worst case, they've got four former phones and devices and -- it's less than 50 devices. You should be able to get them a complete list of all models within a couple days.

Can you do it by Monday?

MS. CARROLL: I don't think that that's feasible, Your Honor.

THE COURT: By Wednesday next week.

MS. CARROLL: My understanding from other bellwether counsel regarding devices listed in the PFS, some of those are not in the plaintiffs' custody -- possession, custody, or

control. They might be a school laptop that they used eight years ago. It might be a family home computer.

THE COURT: Okay. So if it's not currently in their custody, possession, or control, then it's not in -- then I'm not asking you to do something that's physically impossible to do.

MS. PIERSON: But something like a family home computer is clearly within the plaintiffs' possession, custody, or control.

THE COURT: Right. So what I'm saying is, of those devices that are within the bellwether plaintiffs' custody, possession, and control, how long -- will it take more than a week to give them a list of the devices and their model numbers?

MS. CARROLL: I want to clarify that point, Your Honor, because we disagree with Ms. Pierson's -- there are non-parties that live in the household with the plaintiff. And many -- these are -- these are young people. Many of these plaintiffs still live at home or at least the computer that they used during the relevant time period that they may have put on the plaintiff fact sheet because there is no definition for "routine," they may have misunderstood.

I've spoken with at least one client specifically who didn't understand the question, didn't read it properly, put, I think, six different devices.

And when asked the question, "Which of these did you -- was your main device that you accessed social media on," it was two out of six.

And so I think there's a real dispute, and I don't want to -- I don't want to overlook that and promise information from devices that we're not agreeing to.

We want to get them the data and information from those devices that are going to have it. The other ones are not going to -- they're going to be more irrelevant than relevant.

THE COURT: So let me -- I didn't address this -- the second issue you've raised which is: What is the scope of devices at issue here?

So clearly it includes everything that the plaintiffs have defined as a main device. I think that's the wording you used; right? Whether it's current or a previous one -- right? So it's not a single device. It's whatever, within the relevant time period that they ever used as whatever you've called the main device.

I think it also does include any devices within their possession, custody, or control that they have habitually and routinely used to access to the defendants' platforms.

And it's up to you to go back to your clients and make that inquiry and figure out, subject to, you know, all your obligations as counsel, which of those -- and if you're saying that some of the ones on the PFS's don't actually meet that now

that we go back and double-check, then you've got to make that representation. And if it turns out you're right, then you're right. And if it turns out you're wrong, I'm sure the defendants are going to raise it with the Court in one way or the other. Okay?

MS. CARROLL: Yes, your Honor.

And the example that I gave earlier is actually in defendants' favor, where there was only one listed on the routine device section of the PFS, but we know because it's our client, they have an old cell phone that would be part of this primary device; and we would include data from that.

THE COURT: That's great. That's great. And I applaud that.

But, again, you need to go back, and if it's your position that some of the things on the PFS's are either incomplete one way or the other or overinclusive in one way or another, and you've got a list of devices that the bellwethers -- again, ordinary English meaning of the words -- routinely, habitually, regularly use or used during the relevant time period to access the defendants' platforms, those are within the scope of this.

Do you understand?

MS. CARROLL: Yes, Your Honor.

THE COURT: Okay. And -- but they need the list of them so -- what I -- why don't you do this: As part of your meet and confer, file a status report by next Friday as to

whether or not that list has been completely -- whether you met and conferred on it, whether the list has been provided or not. Right?

And I also want to get a status on coming to agreement on search terms. All right? And whether the list of apps has been -- started to have been -- in other words, status report on everything I'm requiring you to do here today. Okay? Because I -- I -- a lot of this is stuff that you should be able to do fairly expeditiously because it's not requiring production of anything at this point, it's just sharing information once somebody looks at the device, whether it's a tablet or a phone or whatever. Okay?

MS. CARROLL: Yes, Your Honor.

MS. PIERSON: Your Honor, two additional just practical considerations.

One, to the extent that the plaintiffs have identified a routine device in their -- in a PFS but they're saying today, okay, that doesn't meet the routinely used definition that we've described today, it would be helpful for us to know what -- also what is the list of devices that they accessed our platforms on but they're now saying that isn't routine.

The PFS says what it -- what it says, so if there's some -- again, to the point of we don't know what we don't know, unless we know what's being excluded, we don't know if we're really being given the full gamut of the information that

you're describing. So it would be helpful to know both.

THE COURT: If you -- let me make it clear.

The list that you give them of devices should be correlated by individual plaintiffs. So if you've got that, you'll be able to tell whether there's something on the list that doesn't match up with the bellwether's PFS; right?

MS. PIERSON: I think that's right, Your Honor. We can at least start there and report back to you in our report on Friday if that doesn't work.

The other practical problem -- and, you know, we're very concerned about the delay that this process has caused. We started this conversation with the plaintiffs in March. Here we are in July with a process that's going to go on into August and September, we fear.

THE COURT: I don't think it's going to go into August and September. They've already started imaging a bunch of the devices. They're going to continue to image all the rest of them; right?

And then you're going to give them the list of the databases, features, settings, all those things that you want from them. And if I've been clear -- I think I was clear -- I'm going to expect the plaintiffs to start a rolling production of all that electronic data and electronic ESI, essentially, to you-all as soon as possible.

MS. PIERSON: Understood.

Back to the apps and platforms other than the defendants' apps and platforms. We also have the practical problem that the defendants can't get information from the app manufacturers because the Stored Communications Act only allows users to request that information. So that information is within the plaintiffs' ability to start gathering now as it relates to other apps that they used that are on the devices.

And we'd like to -- for the plaintiffs to get that process started of collecting that information because we're not able to do that.

MS. CARROLL: May I ask a clarifying point?

Is this from the device -- this is new to me. Is this from the device itself or are you asking plaintiffs to go out to -- I have -- I counted last night because I was curious, probably 85 apps on my own cell phone.

Are you asking plaintiffs to go to 85 app --

MS. PIERSON: Yes.

MS. CARROLL: -- manufacturers and ask for their data or --

MS. PIERSON: Yes.

MS. CARROLL: This is about device forensics. That's what this --

THE COURT: I'm not -- I'm going to deny that request without prejudice because that was never teed up as part of this. That was not briefed, and it's a new -- it's beyond the

scope of what we're talking about today.

If you're asking for, essentially, voluntary discovery from the plaintiffs from third-party app developers, you've got to go through your normal meet-and-confer procedure.

MS. PIERSON: I'm sorry, Your Honor.

I was following up on the comment that you made earlier that once they provide this list of apps to us that we might have to going to those app manufacturers to request the usage information from them. We need both the usage information that's contained within the forensic image.

But if you are expectation, Your Honor, is that we take the information that the plaintiffs give us and that somehow we go out and get that information from various platforms, the practical issue is that that's not possible for us.

So that information, just as the plaintiffs download their data from our apps, that information is also within their possession, custody, and control. They can get that information. We cannot.

MS. CARROLL: We can sign a release that would allow them to do that.

THE COURT: Okay. So make this part of your meet-and-confer. Okay?

MS. PIERSON: Thank you, Your Honor.

THE COURT: All right. Okay.

I think that resolves -- oh, you filed an amended -- or

corrected brief on -- or joint letter on the forensic imaging issue, so can I -- for purposes of record-keeping and housekeeping, can we deem the previous version, which is Docket 998, to be either withdrawn or vacated as moot?

MS. PIERSON: You can, Your Honor. The first one we filed just had the exhibits mixed up a little bit, so we wanted to correct that for Your Honor.

THE COURT: We'll reflect that in the DMC order just so we can get rid of that one from the docket.

Okay. Any other questions -- or practical questions on how to go forward based on my instructions on this particular dispute?

MS. PIERSON: Not today.

MS. CARROLL: No, your Honor. Thank you.

THE COURT: All right. Who -- next dispute is Docket 995, the AGs' preservation obligations.

Madam Reporter, do you need a break?

(Pause in proceedings.)

THE COURT: Why don't we just -- for the reporter, why don't we take a 10-minute break.

MR. SCHMIDT: Understood.

(Recess taken at 2:11 p.m.)

(Proceedings resumed at 2:24 p.m.)

THE CLERK: Remain seated. Come to order. Court is back in session. The Honorable Peter H. Kang presiding.

THE COURT: Okay. Before we move to that issue, I've been meaning to do this. I've been doing it at a regular basis at my normal motions calendars and even CMC calendars, and I keep forgetting to do it with you-all.

But since I'm got so many lawyers and law firms in the room, I want to remind you all, the Court has a robust pro bono program that's always in search of lawyers to represent pro bono clients who have been prescreened by the pro bono staff attorneys in cases.

And so the e-mail address to contact them is fedpro, F-E-D-P-R-O, @sfbar.org. It's run through the San Francisco Bar Association.

My list is a little bit out of date, but I know there are prisoner civil rights cases that need both full-scope representation, some need representation just for settlement conference purposes. There are non-incarcerated plaintiff cases, such as -- there's a product liability case; there's a computer fraud and abuse act case; employment discrimination case; and a 1983 civil rights case, at least on the list I had. Again, it's a little bit out of date.

But they're in front of judges like Judge Chen, Judge Gonzalez Rogers, Judge White, Judge Gilliam, Judge Lin, and even other judges, like Judge Ryu, Judge DeMarchi, and Judge Beeler, at least, again, as of this date.

And so it's a wonderful opportunity for lawyers to get --

give -- provide service to the community, and the Court. I know when I was a younger lawyer, it was a wonderful opportunity to get -- opportunities for younger lawyers to get in-court and deposition experience, in settlement conference experience, and they're always looking for good lawyers. And so please send the word out to your various firms and your friends and your colleagues and everybody you know in the network to contact fedpro@sfbar.org, if there's any interest, which I highly encourage.

Okay. So having said that, State Attorney Generals.

MR. SCHMIDT: Good afternoon, your Honor. Paul Schmidt for Meta.

THE COURT: Good afternoon.

MS. O'NEILL: Good afternoon. Megan O'Neill from the California AG's office on behalf of the state AGs.

THE COURT: Good afternoon.

So I guess it's really -- Meta's pushing this issue, so why don't you go first.

MR. SCHMIDT: Sure. Sure. And I will just say we do appreciate the flag on the pro bono point, our firm, and I'm sure the other firms here take that very seriously, and we will -- we will act on that.

As I signaled before the break, we think this issue is tremendously important. We also think it's pretty straightforward, so I'll be pretty targeted in what I say

guided by what Your Honor said, obviously, about being familiar with the papers.

As a framing point, there is no dispute that the AGs have hold obligations, that they have preservation obligations; and they've not disputed that those go back until 2021. So that is the baseline. And the question is how they meet those preservation obligations. And there's two disputes that the parties presently have on that issue.

One relates to the 20 states that have no hold at all in any form whatsoever, and they're just relying on what we've been given as two examples of policies governing AG's offices.

As to those 20 states, I would highlight three of the cases we cited, again, mindful that the Court's familiar with the cases.

I would cite the *Apple* case where the *Apple* case made a point of saying the fact that Apple is in compliance with a different set of hold policies doesn't answer the question before the Court in terms of different parties, different claims, different products, and different witnesses. We think that principle applies here.

I would cite the *City of Colton* case where this argument was rejected in the context of the EPA making it, the record statutes are sufficient.

And I would cite the *HVI Cat Canyon* case which says very clearly for a large organization -- and federal and state

government departments certainly are large organizations -- it is customary to impose a litigation hold on documents. Once it is reasonably anticipated that litigation may ensue, the case law has developed the expectation that a party will implement such a litigation hold to preserve documents that may turn out to be relevant once litigation is filed.

Those cases all speak to that -- this -- this threshold issue that there should be some form of a hold for these 20 states that have none, and there's been no citation of case law to the contrary that is anything close to the situation.

What we've had instead is reference to two policies, and only two policies -- I think it's Kentucky and California -- that only apply to investigatory files. We already know from the requests that we have served to the AGs requested that they have agreed to answer, at least in part, that that does not cover discovery that will be provided.

So that's a pretty straightforward question. And throughout our meet-and-confers, throughout the briefing, there's never been an ability by the State AGs to make any kind of representation that for the states that have no holds at all, that what the -- what the holds that are being undertaken are, what the policies they're relying on are, or even that they've done the analysis to say: Here's why the majority of states have done it -- or here's why the 15 have done it, here's why the 20 haven't.

None of that is before the Court. I don't think they could put that before the Court because I don't think they've looked at whether Indiana doesn't need a hold but other states have entered a hold. Louisiana doesn't have a hold, et cetera.

So that's the first issue and we think that could not be a simpler issue, the states that have no hold.

The second issue is the agency issue that's pending with the Court. And obviously we are eager for the Court's guidance. I hate saying that with an issue that's thorny, I know, and that the Court is looking at across many states, but that will help the parties.

Our view is that, even in the absence of that guidance, before we have that guidance, they should be doing something with respect to those agencies. They're on notice for us -- from us as to specific agencies that we believe are relevant.

The Court flagged this issue at the May hearing, stating its surprise that state agencies had not received notice of the discovery dispute; the *Ramos* case that we cite supports our position in terms of issuing some kind of notice.

And I would say that the course of conduct also supports that in the time -- in the last several weeks since we have raised this issue, seven states have now given some form of notice to their agencies. We don't yet know the scope of that notice, whether it covers the agencies -- we've identified who it covers -- but they've given some form of notice. And I

would flag a couple of points on that.

One is that there's no discerning principal as to which states have done it and which haven't, which fits with this broader point that there's no evidence before the Court that any kind of a reasoned analysis has been done to determine whether holds are appropriate in the states that have done them but somehow not in the states that haven't.

Two, about half of the seven states that have given agency holds have not imposed a hold within their own AG's office, which, again, seems pretty nonsensical in terms of why they're issuing notices or holds to agencies but not within their own AG's offices.

But then three of those seven states, not one has come forward before the Court with any kind of burden or other type of argument, saying this was really, really tough to do. And, in fact, some of them have said that they've issued holds; some of them suggested they've just sent out courtesy notices, which there's no reason that every state AG could not do pretty -- pretty readily.

So those are the two issues before the Court. We think there's already a baked-in issue on this point in terms of the lack of these holds until now that we'll have to sort out down the road. That's not before the Court right now. But we do have the chance as to -- going forward to mitigate this issue with the Court's guidance, which is why we've presented this

issue to the Court, either to direct that holds be issued, or at least to give guidance as to the Court's views as to the AGs' obligations under the Federal Rules in this area.

THE COURT: Okay. Ms. O'Neill.

MS. O'NEILL: Thank you.

Your Honor, as law enforcement agencies, the AGs take evidence preservation obligations very seriously. And I can confirm that each state AG has -- at issue in this matter, has independently determined that its current practices meet its preservation obligations in this case.

And the reality is evidence preservation is what we do as law enforcement agencies. We're in the business of gathering and preserving evidence that we obtain in investigations. This lawsuit is the result of such an investigation. It's a civil law enforcement action about Meta's conduct and Meta's violations of the law.

The AGs are acting in their sovereign law enforcement capacity as government law offices. We are not percipient witnesses. The information that the AGs have about Meta's misconduct comes from our investigation and our litigation efforts. And the AGs have procedures in place to preserve that evidence that has been obtained in investigations and litigation.

We have pointed in our brief to statutes, regulations, policies, and procedures that mandate the retention of those

investigation and litigation files. And these are the documents that are relevant and core to this case.

Now, Meta is seeking an order from this Court, but it's doing so in the abstract. It's not in conjunction with any particular discovery requests based on speculative and hypothetical concerns. It's pointed to no discovery requests that the AGs have thus far been deficient in responding to. It's essentially circumventing the normal process of responses and objections to discovery requests and conferrals about any disputes.

Now, litigation holds surely are a mechanism for parties to meet their preservation obligations. They're common, and for many litigants in many cases, they're standard practice. The cases that Meta has cited stand for that unsurprising proposition.

But none of Meta's cases require a government law office acting in a sovereign civil law enforcement capacity to issue a litigation hold to its lawyers. And, in fact, none of their cases -- and, I guess, you know, I think my friend on the other side mentioned that they couldn't find a case on point, and I think that's actually an informative fact. It's such an unusual situation that there is no case law on this particular issue.

Meta cites the *Colton* case, but there the EPA was a regulatory agency with subject matter expertise in

environmental issues. The evidence at issue was an analysis of environmental harms by EPA contractors, and the court found fault in not issuing a litigation hold to the people who had percipient knowledge of that model in that environmental analyses. The AGs, by contrast, do not have percipient knowledge of Meta's misconduct and, again, are acting as a government law office.

Other cases, including the *Apple* case, dealt with private parties, and there was also some indication that evidence had been lost.

And again, Meta has not cited to any cases in which a court actually ordered a party to issue a litigation hold.

Now, when an AG's office actions give rise to litigation, when they're the subject matter of litigation, a litigation hold may be appropriate. For example, in California when the Department of Justice sues to enforce a contract or is sued for employment discrimination, then it issues a litigation hold to persons with knowledge of the dispute; but it doesn't need to do so when the AG is prosecuting violations of the law on behalf of the People of the State of California.

The lawyers working on that case don't have percipient knowledge of the dispute, but they do preserve the evidence that is relevant to the violations as a matter of course.

Now, with respect to state agencies, Meta's request is simply an attempt to relitigate the pending state agency

discovery issue.

THE COURT: We're not going to do that.

MS. O'NEILL: And I know there's been a lot of briefing on that and I will not get into the details.

THE COURT: Okay.

MS. O'NEILL: I don't think anyone wants that at this point.

But as we have explained before, very briefly, the AGs have brought this action on their own behalf. They don't represent state agencies in this matter. They're not seeking damages or restitution on their behalf. And they haven't included state agencies or their personnel in their investigation or litigation teams.

So because the AGs don't have legal and practical possession, custody, or control over state agency documents, we also don't have preservation obligations or abilities with respect to those documents.

Now, Meta could have issued subpoenas or preservation notices to the agencies at any time, but it has chosen not to. It says that it's concerned about agencies possibly destroying documents, but it's failed to take this step that's within its power to address that concern.

Unlike in this case, Meta's cases analyze a state agency's duty to preserve evidence when that agency is a party, and none of those cases ordered an AG's office to issue a litigation

hold to a state agency -- or, again, to issue a litigation hold at all.

In *HVI Cat Canyon*, the case was formally brought on behalf of two California state agencies; they were the parties in interest. And in *Ramos*, the California Department of Corrections and Rehabilitation was a defendant in the case.

Now, Meta has noted that some states have taken action to address Meta's concerns about -- State AGs have taken actions to address Meta's concerns about state agencies. Meta advised that it would not consider the issuance of a litigation hold or other actions vis-a-vis state agencies to be a waiver of the AGs' position regarding their possession, custody, or control of agency documents.

So a handful of states who are authorized to issue litigation holds to state agencies have decided to do so out of courtesy to resolve the dispute as to them. Other states have notified agencies of the litigation and of the dispute regarding their documents.

Some have not taken action, and for some this is in recognition of the confusion and tension in state government that could result from the AG sending a request to preserve documents when the AG cannot actually order agencies to do so.

But, again, at bottom, Meta's request to the Court with respect to state agencies should be rejected because the AGs simply do not have possession, custody, or control over those

documents.

MR. SCHMIDT: May I make two points briefly in reply? The first -- thank you, Your Honor.

The first is that the states' view of what are important documents for their investigation doesn't control. As litigants in federal court, they're bound by the rules that what both parties can demonstrate to be relevant controls; and their preservation is not focused on that, it's focused on what they think is important.

And we already know from the extremely limited information we've been given that there are gaps. We know there's no rhyme or reason to why some states have held and some states haven't. There's no showing that it relates to different preservation obligations within the states. And there's no showing that the states that are just wholesale refusing to hold in any manner at all have done any analysis or have any authority to rely on to say: Here's how we're meeting our preservation obligations.

We've been given exactly two examples of those states as -- of states' bases for saying "We don't need a hold because of these requirements." Those two examples we already know from looking at our discovery requests to the states. And their responses as to what they're objecting but agreeing to produce are not sufficient to cover relevant material that will be produced in this case.

We know the same thing is true on the agency side and

we're not relitigating that issue; that issue is pending before Your Honor.

While it's pending, they should be preserving. And, again, the fact that some states have done that and others haven't, we don't hold that against them in terms of waiving their objection to doing agency discovery. I want to be very clear on that.

We do think it illustrates the haphazard and un-thought-out nature of what is happening here, and the fact that there should be a floor that they comply with. The fact that they've done that with no burden assertion at all is meaningful. That's the first point.

The second point is quite simply that the states are not excused from the Federal Rules because they say that they're performing an investigatory or regulatory lawsuit. The Federal Rules apply fully in that setting. They chose to file in federal court. There's not a special AG rule on discovery or discovery obligations. The *Colton* case speaks to that. That was a CERCLA case brought by the FDA -- brought by the EPA, I'm sorry, where the Court was very clear that hold obligations apply fully in that context.

And it's worth noting they've not disputed they're subject to discovery. They've not disputed they have preservation obligations. And they've not actually cited a single case that says -- notwithstanding discovery obligations that they've now

conceded in terms of agreeing to produce documents, preservation obligations they've conceded -- they're somehow not subject to any kind of hold obligation.

And the positions they've taken in terms of the conflicting positions they've taken speak to the lack of merit in that position, as does the lack of any case supporting their view when we have put cases before the Court that are contrary to their view.

Thank you.

MS. O'NEILL: Your Honor, may I briefly respond?

THE COURT: Sure.

MS. O'NEILL: Thank you.

Just taking the second point first, Your Honor, the state AGs do not object to the Federal Rules applying to them or take -- have any dispute with that.

Litigation holds are not always required to meet preservation obligations, and the state AGs, as I mentioned before, have determined that the procedures that they have in place are sufficient to meet their preservation obligations.

Regarding the fact that state AGs may have taken different positions or taken different actions, some state AGs, of course, have issued litigation holds, some have not.

Each state AG is different, has different approaches, has different structures, and has different policies and procedures. We are each separate parties that have distinct

aspects.

Some AGs have decided to issue litigation holds as part of a belt-and-suspenders approach and some have not.

I'd also just note that Meta has not raised this dispute as to particular RFPs or as to any alleged deficiencies in the AGs' responses to any RFPs. It could have done so, and if it had, the Court would have the full picture in front of it, including the AGs' objections to those RFPs.

The AGs have lodged objections to some RFPs and agreed to produce in response to others. If there are materials that we haven't agreed to produce, and Meta believes that they should be, or there are places that they believe, repositories that they believe we should search and we have not agreed to, then we can engage in conferrals and we can go through that process.

But that's not the dispute that Meta has raised here. Instead, Meta has asked for relief that we think is unnecessary and not appropriate.

MR. SCHMIDT: May I just make one small factual point on where the discovery stands?

I believe we've gotten a handful of documents -- 900 -- from the AGs. They're at the very early stages of their production, so we have no way right now to know the impact of this. I suspect we may be back before the Court once we do know the impact of that.

But that's a different question than: How do we prevent

this from compounding, as a problem, going forward where we do know this will be a problem going forward?

THE COURT: Okay.

MS. O'NEILL: Your Honor, I just have to very briefly dispute that. Meta is able to bring disputes regarding particular RFPs if they have a problem about the way that we are searching for and the types of documents that we are looking at. And we are in the process of conferrals. We have had meet-and-confers. We have exchanged correspondence. But we're waiting for correspondence and have been waiting for over a month from Meta related to our position on how we're conducting searches and the documents that we believe are relevant and proportional to the needs of the case.

MR. SCHMIDT: Without agreeing with the one-month point, that is correct; we are conferring on discovery, and we will bringing that to the Court. That's separate than what that issue is.

THE COURT: I hope you're conferring so that you don't need to bring it to the Court.

MR. SCHMIDT: Yes, that is our goal, obviously.

THE COURT: That's my goal.

MR. SCHMIDT: Yes.

THE COURT: That should be your goal as well.

MR. SCHMIDT: It is our goal.

THE COURT: Okay.

MR. SCHMIDT: And we've been guided -- if I can just say something on that, Your Honor.

We have been guided by Your Honor's direction on that and have resolved a lot of issues on that basis -- and that's true on the other side as well -- from conferring with plaintiffs that they've been guided by that as well.

THE COURT: I'm gratified by that.

Okay. So there's no dispute here that the state AGs, as litigants and parties, are fully bound by the Federal Rules of Civil Procedure just like any other litigant.

So as in Judge Grewal's opinion in his *Apple/Samsung* case on preservations, 881 F.Supp.2d 1132. He said, you know (as read):

> "The common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated. The duty to preserve evidence also includes an obligation to identify, locate, and maintain information that is relevant to specific predictable and identifiable litigation.
>
> "At the same time, it is generally recognized that when a company or organization has a document retention policy, it is obligated to suspend that policy and implement a litigation hold to ensure the preservation of relevant documents after the preservation duty has been triggered."

So as I understand, as to the 20 states that have not -- it is 20, right? -- that have not issued any kind of litigation hold?

MS. O'NEILL: I actually have one update that I have not updated Meta on, but it is 19; one additional state has issued a litigation hold.

THE COURT: Okay. All right.

As to the 19 states that have not issued litigation holds within the AG's office itself -- I'm not talking about the agency issue right now -- I understand the state AGs to represent to the Court that those 19 states have determined internally that their existing obligations under either policy, regulation, or statutory -- local statutes, in their views, would satisfy their preservation obligations under the Federal Rules.

That may or may not be true. I don't need extra briefing on that.

MS. O'NEILL: Understood.

THE COURT: I've heard no argument, and I don't think there could be a credible argument, that issuing a litigation hold is burdensome. It's not -- it's just issuing a litigation hold. I mean, I don't want to sound like a broken record, I've done it myself, it's not that hard; right?

And so if the state AGs are correct, that their current obligations under local law, statute, regulation fully complies

with what a litigation hold would require, then issuing a litigation hold is, at best, duplicative and not burdensome. Okay?

If Meta and the defendants are correct that there's some universe of documents that would somehow not be captured by local statute, regulation, or policy -- and they cite as examples their, I think it's really suspicion, that it could be things like communications with school boards, lobbyists, and advocacy organizations; documents related to proposed litigation; they reference other document requests -- I don't know whether those are covered by everybody's local statute, regulation, or policies, but to the extent there are -- there is some sub-universe of documents that would not be covered by the local statute, regulation, or policies, then the issuance of a litigation hold is not duplicative because it would pick up those categories that are outside of whatever scope the local law or statute requires; right?

And so in that case -- that case, issuing a litigation hold is certainly advisable at this point, if there is -- if there does exist some lack of overlap between the two.

So just on the issue of should a litigation hold be issued, the answer is, yes. I'm going to order the 19 states that haven't issued one to issue litigation holds because, again, if it's duplicative, then there's very little burden to issuing them. And if it's not duplicative, then it's picking

up documents that aren't subject to existing policy, statute, or regulation.

MS. O'NEILL: Your Honor, could I just be heard on the burden point very briefly?

THE COURT: You didn't make the argument in the brief, so -- and like I said, even if you were to try to make a burden argument at this point, I -- I mean, I guess -- I said it, I'll say it again: It's not that hard. Okay? Issuing a litigation hold to the set of people identified -- who you identified is just not that hard.

Okay. So I'm not, at this point -- and nobody's arguing this. I'm not deciding when any particular State AG's office preservation obligation attached, what the date of that was, because we're talking about for these states that it hasn't been done yet, so it doesn't really matter at this point when that obligation attached.

And I'm certainly not deciding that there's even the hint of any kind of spoliation or risk of spoliation here. It may be that the state AGs' obligations have fully preserved everything, and Meta's suspicion that there's this, quote, could be a problem or will be a problem going forward, is -- that's speculation at this point. So I'm not -- I don't want anybody to take the position that I -- by issuing this order, I'm implying that I think or agree that there's a potential spoliation problem.

I will point out, in *United States v. Federal Resources Corporation*, 2012 Westlaw 1623408, the chief judge of that district ordered the Government to issue litigation holds -- here at the Department of Justice -- litigation holds. And he ordered them to issue them to the Department of Energy, the Department of the Interior, and the Department of Agriculture.

And this was over the Government's objection, so there's that.

I also note that in *FTC v. Lights of America*, 2012 Westlaw 695008, the Central District of California ordered that the FTC -- and this was raised in the context of a spoliation argument -- that the FTC did, at some point, have an obligation to issue litigation holds to itself even though it was an investigative agency, but held that simply starting an investigation, in this particular case, did not trigger the date for when the litigation hold should have been issued because it did a much more detailed analysis of when was litigation actually anticipated and reasonably anticipated, and went through that.

So the fact that an investigation started in this case in the *FTC/Lights of America* case, that was not enough to justify or require that a litigation hold be issued.

Also, I think, ultimately, if I remember correctly, I don't think that court found any spoliation. All right?

So I'll tell you right this -- I'm not prejudging

anything. I'm not a big fan of parties spending a lot of time on spoliation arguments over things that are not material to the case. If it turned out somebody deleted some e-mails having to do with, you know, setting up a lunch or something -- I don't want those kind of disputes. I don't want you spending your time and energy on disputes that are not germane to the merits of the case.

Having said that, I mean, if -- I'm hoping that, you know, Meta's suspicion that something went wrong here turns out not to be well-founded, and once you take your discovery, you're going to figure out that there's nothing here.

But I draw these cases to your attention to address the parties' points that, A, there is precedent for courts ordering investigative agencies to issue litigation holds to themselves when they're parties themselves. All right?

And also ordering, in this case, the Department of Justice, the Civil Litigation Enforcement Agency to issue litigation holds to other agencies of the U.S. Government. Okay?

So I don't know how I found those and you didn't, given the number -- amount of resources you all have compared to me. But anyway, the Court found those.

So take those into account as you go forward in these disputes. You may want to do more legal research on your own.

But I think that -- that resolves the first big issue is:

Do the AGs have to issue litigation holds to themselves?

The answer, I think, is yes, as I said -- not I think, is yes.

The agency issue, my expectation is the Court will be issuing the order on state agency discovery -- I'm not going to give an exact date, but in due course and hopefully shortly. And the Court will issue a supplemental order after that because I think everybody recognizes that that decision will impact this decision.

I will -- I'm not going to order the State AGs to do this because, again, the state agencies are currently not parties to the case. All right? But as a courtesy, some of the state AGs have given notice to the agencies of the pendency of the suit, the discovery disputes here. I certainly think that, as a matter of caution, that's not a terrible thing to have done.

And, again, I don't -- I'm not requiring anybody to do that, but for those state AGs that haven't at least just given a courtesy notice to the agencies, since you know who they are, I would think hard about whether or not it's advisable, just as a matter of courtesy.

MS. O'NEILL: Thank you, Your Honor. Understood.

I have two just small points.

THE COURT: Sure.

MS. O'NEILL: I did just want to make, for the record, related to a comment that my opposing counsel made early on

that it was undisputed that the State AGs had a preservation obligation that began in 2021, I just -- kind of following on Your Honor's comments that you're not issuing an order related to when that preservation duty attached, that is not undisputed, just for the record.

And then I also wanted to just clarify the scope of your order and -- related to what the scope of the litigation holds being ordered are. My understanding would be that the State AGs will determine who is likely to have relevant information based on the law about preservation, but I just wanted to clarify that that -- that is Your Honor's understanding as well.

THE COURT: Correct. I fully expect the State AGs to follow, I think, ample guidance in the law as to, you know, the breadth of people who should be recipients of litigation holds. And I assume you've got plenty of examples in, you know -- both in the case law and within your own practices on how to do that.

Yeah. I'm not ordering anything unusual in that regard. I expect the State AGs to do a reasonable, you know, competent inquiry as to who should get the litigation holds and issue them appropriately.

MR. SCHMIDT: And, Your Honor, we're not -- we're not asking for anything more than that.

The only thing we would ask for is to get the same

information regarding the new states that we got for the old ones, which is just date and person.

THE COURT: Any objection to --

MS. O'NEILL: No objection.

THE COURT: Okay.

MR. SCHMIDT: Thank you, Your Honor.

THE COURT: Good. I think that resolves Docket 995.

MR. SCHMIDT: I think it does, Your Honor.

THE COURT: Okay.

MR. SCHMIDT: Thank you.

THE COURT: Okay. On other ripe disputes, I don't -- well, I know that -- for the record, the one related to the TikTok defendants and plaintiffs, the Court received an e-mail dated July 8th, 2024, from counsel for TikTok and the SD/PI plaintiffs reporting that the parties have reached agreement on plaintiffs' request for production related to influencers, RFPs 249 to 252. So that resolves that one.

I just want to state that for the record because there was an e-mail, which is not on file in the docket.

So thank you for that report, and thank you for working out that issue.

I don't think there are any other ripe issues to discuss, are there?

MR. RICE: Your Honor, Rowley Rice from Munger, Tolles & Olson for Snap.

There was one other ripe issue listed in the DMC for Snap, but the parties have been meeting and conferring, and anticipate that we're going to -- we're generally aligned on the scope of the RFPs and took the H2 off calendar and are continuing to meet and confer on search terms.

THE COURT: Great. I appreciate the work on that, and certainly encourage you to keep working those things out.

MR. WARREN: And, Your Honor, Previn Warren for the personal injury/school district plaintiffs.

I also did just want to mention that the parties, I believe, have or shortly will submit to chambers the updated deposition chart that I believe is due.

THE COURT: Great. And I take it from the earlier portion of the status report that scheduling depositions is proceeding apace and there's no disputes to be raised with me to consider at this point.

MR. WARREN: Nothing at this point, Your Honor.

THE COURT: Good. I appreciate the cooperation on getting those calendared.

Okay. Any other issues, questions, people want to raise with the Court at this time?

MS. LANGNER: Good afternoon, Your Honor. Bailey Langner from King & Spalding for the TikTok defendants.

Your Honor, I just wanted to briefly update you on one item from the unripe section related to school districts. And

that's Section 3, related to the school district plaintiffs' Rule 26 disclosures regarding computation of damages.

THE COURT: What page of the --

MS. LANGNER: That is page 13, Your Honor.

THE COURT: 13. Okay. Yup. Okay. I'm there.

MS. LANGNER: The parties met and conferred. They conducted an H2 conference on July 8th related to this issue with lead counsel. And the plaintiffs continue to take the position that their computation of damages are not required until the expert discovery phase of litigation. The parties have reached an impasse on that issue and will be submitting letter brief this coming Monday, July 15th.

THE COURT: I was hoping you'd work that one out. Okay. We'll take that up in due course once I see the letter brief.

MS. LANGNER: Thank you, Your Honor.

THE COURT: Any other reports or issues, Ms. O'Neill?

MS. O'NEILL: Megan O'Neill for the AGs again. Just have a small matter related to the third set of RFPs for the AGs.

The AGs and Meta have agreed to a seven-day extension of the deadline for the AGs to serve their third set of RFPs, subject to the Court's approval. The Court had previously ordered that to be due on July 15th, and we've agreed to move that deadline to July 22nd.

THE COURT: Is that correct?

MS. SIMONSEN: That is correct with the --

THE COURT: For the record, identify yourself.

MS. SIMONSEN: Apologies. Ashley Simonsen for the Meta defendants.

That is correct. The state AGs requested that extension. We granted it subject to their agreement that we could have an extra seven days for our responses and objections, which they have granted.

MS. O'NEILL: That's correct.

THE COURT: Okay. So ordered.

MS. O'NEILL: Thank you.

MS. SIMONSEN: Thank you.

THE COURT: Any other issues to discuss at this point?

MS. SIMONSEN: Nothing from defendants. Thank you, Your Honor.

THE COURT: Okay. We're adjourned until the next hearing in this case.

THE CLERK: We're off the record in this matter. Court is in recess.

(Proceedings adjourned at 3:02 p.m.)

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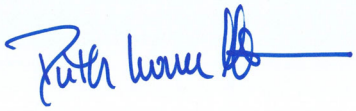
CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Sunday, July 14, 2024



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